Editorial

An assessment of Public Procurement Acquis during the 7th and 8th EU Parliament Legislature.

Legislative actions during the 7th and 8th EU Parliament legislature have introduced a generation of legal instruments which aim at establishing gradually a homogenous public procurement market in the European Union. The European Institutions through the enactment of the Single Market Act¹ have identified public procurement as essential component of competitiveness and growth² and as indispensable instrument of delivering public services.³

During the 7th and 8th EU Parliament legislature the reforms on public procurement have sought to accomplish unobstructed access to public markets through transparency of expenditure relating to public and utilities procurement, improved market information through the introduction of technology to the application of the procurement rules, elimination of technical standards capable of discriminating against potential contractors, uniform application of objective criteria of participation in tendering and award procedures and regulatory alignment between public sector and utilities procurement.

The current public procurement *acquis*⁴ has prescribed a different regulatory treatment to public sector procurement and utilities procurement, for two reasons. Firstly, a more relaxed regime for utilities procurement, irrespective of their public or privatised ownership has been justified and accepted as a result of the positive effects of liberalization of network industries which has stimulated sectoral competitiveness. Secondly, a codified set of rules, covering supplies, works and services procurement in a single legal instrument for the public sector aims at producing legal efficiency, simplification and compliance in order to achieve the opening up of the relatively closed and segmented public sector procurement markets.

A decentralized dimension of the public procurement rules has been introduced by the procurement Remedies Directives,⁵ which nevertheless, suffered from serious deficiencies, as they did not provide for effective review procedures between the stages of contract award and contract conclusion. Thus, the Remedies Directives have been inadvertently promoting direct awards and the so-called 'race to sign' the relevant contract to ensure immunity from any redress, based on the *pacta servanta sunt* principle. In addition, during both pre-contractual and post-contractual stages there were no effective deterrents for breach of either procedural or substantive public procurement rules. These deficiencies

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- 1 European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.
- 2 European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.
- 3 European Commission, Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, 7.12.2010, SEC(2010) 1545 final. European Commission, Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement, SEC(2010) 1258, final.
- 4 Directive 2014/24 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; Directive 2014/25 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; and Directive 2014/23 on the on the coordination of procedures for the award of concessions.
- 5 Public Sector Remedies Directive 89/665 [1989] OJ L395/33; and the Utilities Remedies Directive 92/13 [1992] OJ L76/14.

were corrected by the amending Remedies Directive⁶ introducing new themes such as a clear divide between pre-contractual and post-contractual stages, a balance between effective review of public contracts and need of efficient public procurement, a strict stand-still requirement for contract conclusion, including direct awards by contracting authorities and extensive communication and monitoring requirements.

The reforms on public procurement have met three principal objectives: simplification, modernization and flexibility.

The objective of simplification has been met to a large extent by the introduction of the public sector Directive on supplies, works and services which represents a notable example of codification of supranational administrative law. The main influence for the codification of the public sector Directive can be traced in important developments in the application of the public procurement rules by defining essential legal concepts such as public contracts, contracting authorities, the remit of selection and qualification criteria, and the parameters for contracting authorities to use environmental and social considerations as award criteria and which have influenced public procurement law making.

The objective of modernization has been met mainly as a result of the newly introduced concepts. The ability of private undertakings, which pursue activities of general interests of non-commercial or industrial character to tender for public contracts alongside bodies governed by public law, the introduction of the competitive dialogue to facilitate the award complex projects such as public private partnerships and trans-European networks, the introduction of framework procurement to the public sector, the use of electronic procurement concepts such as e-auctions and dynamic purchasing systems, the digitization agenda and the introduction of concessions procurement regulation.

The flexibility objective of the public procurement reforms reflects on the relaxation and the disengagement of the public procurement rules in industries that operate under genuinely competitive conditions in the utilities sectors, such as telecommunications. Flexibility is also present at the disengagement of the rules in contractual arrangements such as public-public partnerships and in-house relations, as well as in certain sectors such as water for concessions procurement. The flexibility of the public procurement regulatory regime is reflected in important recent case-law developments, in particular case-law on the definition of contracting authorities, the use of award procedures and award criteria, and the possibility for contracting authorities to use environmental and social considerations as criteria for the award of public contracts. Further, the fact that flexibility underpins the relaxation of the competitive tendering regime and the disengagement of the public procurement rules in industries that operate under competitive conditions in the utilities sectors indicate the links between procurement regulation and anti-trust. The non-applicability of the regime to telecommunications entities is an important development indicative of the future legal and regulatory blueprints.

The recent reforms of the public procurement regime are felt in public-public partnerships and in-house contractual relations between contracting authorities or undertakings upon which the former exercise control similar to that exercised over their own departments and the controlled entities are operationally dependent on them link conceptually very well with public contracts awarded by utilities to their affiliated undertakings and public service contracts relating to services of general economic interest and contracts having the character of a revenue-producing monopoly, and as such reflect on the positive dimension of inherent flexibility in the 2014 public procurement Directives.

6 Directive 2007/66 [2007] OJ L335/31.

Public contracts, which fall below the stipulated value thresholds (sub-dimensional contracts), represent the most difficult category for reform and the biggest opportunity for discretionary exercises in public purchasing. On the one hand, they encapsulate a significant amount of Member States' public expenditure, which escapes the clutches of the public procurement *acquis*. On the other hand, there is an imperative to subject these contracts to some form of competition and has supplemented the public procurement Directives with EU law principles which ensure a parallel process of procurement with dimensional public contracts. This development has created uncertainty in the market place and resulted in a dysfunctional application of procurement rules to those contracts. The administrative and procedural burdens on the part of contracting authorities often surpass any potential efficiency benefits resulting from competitively tendering sub-dimensional contracts. In addition, adequately sufficient safeguards against intentional division of dimensional contracts into lots in order to avoid the applicability of the public procurement Directives exist in the current *acquis*.

Future reforms of the public procurement *acquis* should focus upon the digital transformation of public and utilities procurement. Through the adoption of technology systems such as e-Certis and ESPD, alongside the application of electronic procurement and electronic invoicing, the digitization agenda of public procurement will streamline the application of the rules, introduce efficiency in the process and make public procurement more attractive for businesses, especially SMEs resulting in increased competitiveness.

Another potential for reform should focus on the way service concessions and contracts are awarded by a contracting authority to another contracting authority on the basis of exclusive rights, in the light of the interface of the public procurement *acquis* with the Services Directive.⁷

The most pronounced deficiency of the public procurement Directives is their porosity which is caused by non-exhaustive harmonisation. The porosity of the public procurement Directives undermines their effectiveness by preventing their applicability to certain contractual situations and as a result restricting a *de lege ferenda* extension of their provisions.

The strategic importance of public procurement for the European integration process has been recognised by the 2011 Single Market Act⁸ which has prompted a series of reforms to the EU Public Procurement *acquis*.⁹ These reforms aim at linking directly public procurement with the European 2020 Strategy which focuses on growth and competitiveness. The importance of a liberalised and integrated public procurement as an essential component of the Single Market has been clearly established.¹⁰ The conceptual origins of public procurement regulation in the European Union can be traced in policy instruments which identified purchasing practices of Member States as considerable non-tariff barriers and as hindering factors for the functioning of a genuinely competitive internal market.¹¹ Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border trade of

7 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36.

8 European Commission, Communication, Europe 2020, A strategy for smart, sustainable and inclusive growth, 3.3.2010, COM (2010) 2020 final.

9 Green Paper on the modernization of EU public procurement policy: Towards a more efficient European Procurement Market, COM(2011)15/47.

10 European Commission, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, COM(2010) 608 final.

11 European Commission, *White Paper for the Completion of the Internal Market*, COM (85) 310 fin, 1985; also Green Paper on Public Procurement in the European Union: *Exploring the way forward*, European Commission 1996; also European Commission, Communication on Public Procurement in the European Union, COM (98) 143.

products and services destined for the public sector and to achieve price transparency and price convergence across the European Union, thus achieving significant savings.¹² The need for competitiveness and transparency in public procurement markets is also considered as a safeguard to fundamental Treaty principles,¹³ such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.

Public procurement regulation has an introvert focus on the internal market of the European Union. It envisages bringing the respective behaviour of the public sector in parallel to the operation of private markets. Public procurement regulation reveals distinctive *sui generis* markets which function within the EU internal market and have as main feature the pursuit public interest. They are referred to as *public markets* where the pursuit of public interest is the main behavioural driver. Further variances distinguish public markets from private markets apart from the substitution of profit maximisation. These focus on structural elements, competitiveness, demand and supply conditions, pricing and risk.

Public procurement regulation relies on harmonisation. Harmonisation has been entrusted to carry public procurement regulation through Directives, as legal instruments, which have been utilized to provide the framework of the *acquis communautaire*, but at the same time afford the necessary discretion to the Member States as to the forms and methods of their implementation. By allowing for discretion to Member States, an element of public policy is inserted in public procurement regulation, which reveals ordo-liberal policy inferences and decentralized features.

The evolution of the public procurement *acquis* has been affected by conceptual and regulatory vagueness, limited interoperability with legal systems of Member States and continuous market-driven changes in modality options and in financing the delivery of public services.

These shortcomings have been addressed by the Court of Justice of the European Union (CJEU). Public procurement law has benefited from the instrumental role of the CJEU, which has provided intellectual support to the efforts of the European institutions to strengthen the fundamental principles which underpin public procurement regulation.

The European institutions, through the enactment of the Single Market Act,¹⁴ have identified public procurement reforms as essential components of competitiveness and growth and as indispensable instruments of delivering public services.¹⁵

All Public Procurement Directives benefit from the principles of discretion and flexibility in their application by Member States. Discretion of Member States in applying public procurement law is surrogate to the principle of proportionality. The conceptual link is the principle of flexibility in public procurement law which has been developed and deployed by the jurisprudence of the CJEU. The discretion is reflected on the fact that the EU public procurement is enacted and implemented in domestic legal systems by reference to harmonisation, but procurement rules are inherently flexible to accommodate compliance

12 Commission of the European Communities, *The Cost of Non-Europe, Basic Findings, Vol.5, Part.A; The Cost of Non-Europe in Public Sector Procurement*, Official Publications of the European Communities, Luxembourg, 1988. Also the Cechinni Report 1992 *The European Challenge*, Aldershot, Wildwood House, 1988.

13 Cases C-223/99 *Agora Srl v Ente Autonomo Fiera Internazionale di Milano* and C-260/99 *Excelsior Snc di Pedrotti Runa & C v Ente Autonomo Fiera Internazionale di Milano* [2001] ECR 3605; C-360/96 *Gemeente Arnhem Gemeente Rheden v BFI Holding BV* [1998] ECR 6821; C-44/96 *Mannesmann Anlagenbau Austria AG et al v Strohal Rotationsdruck GesmbH* [1998] ECR 73.

14 Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act* COM(2010) 608 final.

15 Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest, SEC(2010) 1545 final. See Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, SEC(2010) 1258, final.

and legal interoperability with EU principles and policies. The doctrine of flexibility allows the principle of proportionality to be employed in the application of public procurement rules by national legal systems.

The Single Market Act relies on a simplified public procurement regime in the European Union, which will result from procedural efficiencies and from streamlining the application of the substantive rules. The professionalization and commercialisation of procurers in the Member States will insert quality and consistency in the public procurement process and assure competitors of legitimate expectations from the award of public contracts. Public procurement regulation will play a pivotal role for the delivery of the European 2020 Growth Strategy.

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